RECORD AND BRIEFS

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No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL., APPELLANTS

v.

WILLIAM WHITFORD, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARIZONA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEVADA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Missouri, Nevada, Ohio, Oklahoma, South Carolina, Utah, and West Virginia. The States have a vital interest in the rules that govern apportionment of seats for state legislative bodies and the United States House of Representatives. This Court has repeatedly held that "reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)).

And the Court has recognized that reapportionment by state legislatures is an inherently political task. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973). The Court has never held that a State violates the Constitution by pursuing or achieving political goals through reapportionment.

Yet in this case, the district court held that Wisconsin violated the Constitution when it passed Act 43, the reapportionment plan for its Assembly and Senate, because that plan was purportedly an unlawful partisan gerrymander. The district court's decision invites openly partisan policy battles in the courtroom. This will expose every State to litigation under a legal standard so indeterminate that any party that loses in the legislature has a plausible chance of overriding that policy decision in the courts. The Constitution does not support, let alone compel, this result.

SUMMARY OF ARGUMENT

Plaintiffs' expert in this case concluded that the proposed partisan-gerrymandering standard offered by plaintiffs would have invalidated a redistricting plan in 36 States over the past few decades. That includes States across the country, from Alabama to Washington, California to New York, and from Massachusetts to South Carolina. *See infra* pp.25-26. Plaintiffs thus propose nothing short of a paradigm shift in how legislatures and courts approach redistricting.

Yet this Court has repeatedly recognized that legislative reapportionment is an inherently partisan task. Partisan purpose is thus inherent in the nature of legislative reapportionment. There is nothing invidious or irrational, under the Equal Protection Clause, about legislatures having partisan purposes when reapportioning legislative seats.

Furthermore, the district court's indeterminate standard does not draw a manageable line between permissible and impermissible partisan purpose and effects. This Court has made clear that partisan-gerrymandering claims are not cognizable based on a measure of proportional representation between the statewide votes and seats obtained by a political party. *See infra* pp.21-22. Nevertheless, the split decision of the district court here recognized such a partisan-gerrymandering claim under an amorphous test—based on a metric of proportional representation—that could be used to threaten countless state legislative reapportionment plans. At base, the district court's reliance on vote-dilution cases misunderstands the difference between those claims regarding *individual* rights versus the novel *group*-based right recognized by the district court.

The district court infused proportional representation into its analysis by relying on plaintiffs' "efficiency gap" analysis as "corroborative evidence" of the effectiveness of the declared partisan intent. But this efficiency gap analysis—which calculates a percentage based on the number of "wasted" votes (that is, votes for the winning candidate beyond the 50% margin needed for victory plus any votes for losing candidates) divided by the total number of votes in the election—measures nothing meaningful in the real world of a given district. The efficiency-gap calculation is just designed to achieve a particular type of proportional political outcome. Given the Court's longstanding rejection of proportional representation, it should not now adopt a mathematical formula that would require courts to ensure certain political outcomes for every state legislature in every redistricting cycle.

ARGUMENT

This Court has repeatedly recognized a widely known fact: Politics is, and always has been, a part of redistricting. Far from being invidious or irrational, political competition is a necessary component of legislative-controlled redistricting. The district court fundamentally misunderstood this Court's Equal Protection Clause precedent, which requires a showing of invidious or irrational purpose—and one that overcomes the strong presumption of constitutionality and good faith accorded to legislative acts.

Worse yet, the district court's test for sustaining a partisan-gerrymandering claim rests on an untenable assumption that redistricting plans should produce proportional representation. Moreover, plaintiffs' proposed standard would have invalidated redistricting plans in 36 States over the past few decades. Thus, far from

eliminating politics from redistricting, the district court's test would shift political battles from the statehouse to the courthouse.

I. Legislatures Do Not Act Invidiously or Irrationally, Under the Equal Protection Clause, When They Reapportion With a Partisan Purpose.

Legislatures do not act invidiously or irrationally when they reapportion with a partisan purpose. And the Court has recognized numerous times that partisan politics are inherent in the nature of legislative-controlled reapportionment. This fatally undermines the existence of partisan-gerrymandering claims.[1]

A. Partisan-gerrymandering claims require showing that a legislature acted with an invidious or irrational purpose.

A claim of unconstitutional partisan gerrymandering is an allegation, under the Equal Protection Clause, that a legislature has acted with an invidious or irrational *purpose*. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judg-

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[1] The Court can therefore hold that partisan-gerrymandering claims are not cognizable under the Equal Protection Clause—wholly apart from any potential application of the political-question doctrine's limits on Article III jurisdiction. That said, the political-question doctrine would independently bar partisan-gerrymandering claims. Partisan concerns are a constitutionally appropriate element in the redistricting process, so any partisan-gerrymandering standard triggered by the degree of partisan interest motivating the plan can have no predictable limiting principle and is, at base, a question for the political branches. *E.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962) (holding that, among other things, the "lack of judicially discoverable and manageable standards" for resolving a dispute make it a political question, outside the Judiciary's power).

ment) (a partisan-gerrymandering claim alleges that "political classifications . . . were applied in an invidious manner or in a way unrelated to any legitimate legislative objective"); *see also Whitcomb v. Chavis*, 403 U.S. 124, 155 (1971) ("it would not follow that the Fourteenth Amendment had been violated unless [the law] is invidiously discriminatory"); *Gaffney*, 412 U.S. at 754 (redistricting plan may be unconstitutional if political group is "fenced out of the political process and their voting strength invidiously minimized").

Because a partisan-gerrymandering challenge to a redistricting plan must allege invidious action, it is "subject to the standard of proof generally applicable to Equal Protection Clause cases."[2] *Rogers v. Lodge*, 458

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[2] As support for treating partisan intent as invidious, the district court invoked the First Amendment's freedom-of-association principle and cases related to the ability of groups to speak. J.S. App. 109a (analyzing plaintiffs' claim under combination of associational rights and Equal Protection jurisprudence); J.S. App. 176a-77a (concluding that the associational rights of members of the Democratic Party were impaired because they could not transform their votes into electoral results); J.S. App. 226a (concluding that individual plaintiffs had standing to present harm to Democratic Party). However, partisan intent is necessarily behind the exact type of speech and association inherent in political parties speaking and their members voting during elections. *E.g.*, *Vieth*, 541 U.S. at 313-14 (Kennedy, J., concurring in the judgment) (a "'[r]epresentative democracy . . . is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views'" (quoting *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)). The Court has long declined to take a role in elevating any particular partisan message or outcome in the election process. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1, 57 (1976) (per curiam) ("The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."). And it has always described the First Amendment as providing access to the political

U.S. 613, 617 (1982). The Equal Protection Clause does not forbid state action that merely affects some individuals differently than others. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."). A claim of mere disparate effect does not violate the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see Reno v. Bossier Par. Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) (plurality op.)).

Plaintiffs' obligation to prove invidious purpose, therefore, "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Rogers*, 458 U.S. at 619 (quoting *Bolden*, 446 U.S. at 66 (plurality op.)).

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process, not a right to particular partisan outcomes. *E.g.*, *id.* ("In the free society ordained by our Constitution it is not the government, but the people individually as citizens and candidates and collectively as associations and political committees who must retain control over the quantity and range of debate on public issues in a political campaign."). At any rate, as explained below, *see infra* Part II, the tests advanced in this case do not present the "pragmatic or functional" test that would be required to administer a First Amendment regime tied to the election outcomes for the political parties. *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in the judgment).

B. Partisan purposes are inherent in legislature-controlled redistricting, and there is nothing invidious or irrational about such purposes.

This Court has said time after time that partisan purposes are inherent in redistricting, for example:

- "Politics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S. at 753.
- "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." *Growe*, 507 U.S. at 33.
- "[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition." *Miller v. Johnson*, 515 U.S. 900, 914 (1995).
- Redistricting "ordinarily involves criteria and standards that have been weighed and evaluated by the elected branches in the exercise of their political judgment." *Perry v. Perez*, 565 U.S. 388, 393 (2012) (per curiam).[3]

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[3] *See also Vieth*, 541 U.S. at 285 (plurality op.) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . ."); *Davis v. Bandemer*, 478 U.S. 109, 129 (1986) (plurality op.) ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."); *Karcher*

Consequently, the fact that a legislature reapportioned with a partisan purpose is not evidence that the legislature acted invidiously or irrationally. *See, e.g.*, *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring in the judgment) ("[A]ppellants' evidence at best demonstrates only that the legislature adopted political classifications. That describes no constitutional flaw . . . .").

In contrast, when a legislature acts with a purpose to create a racial classification, for example, that purpose itself is invidiously suspect.[4] But there is nothing inherently suspect, invidious, or irrational about a legislature using a partisan purpose when redistricting. *See Vieth*, 541 U.S. at 307 (Kennedy, J., concurring in the judgment) ("Race is an impermissible classification. Politics is quite a different matter." (citation omitted)).

This Court's precedent establishes that partisanship and entrenchment are not invidious purposes—and for good reason. For example, bipartisan gerrymanders, which often favor incumbent legislators of both parties, are permissible. *See Gaffney*, 412 U.S. 735 (holding that a redistricting plan drawn by a bipartisan commission along political lines was not invidiously discriminatory);

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v. Daggett, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) ("Legislators are, after all politicians; it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting.").

[4] *See Rogers*, 458 U.S. at 617 ("[I]n order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.'" (quoting *Washington v. Davis*, 426 U.S. at 240)); *Bolden*, 446 U.S. at 66 (plurality op.) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966) ("The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."). Such gerrymanders are just as likely to involve both an "injection of politics," *Vieth*, 541 U.S. at 293 (plurality op.), and an "intent to entrench" those who control the process, J.S. App. 117a. But neither violates equal protection: "[t]he very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats." *Gaffney*, 412 U.S. at 753.

Determining what is "politically fair" is a task left to the States to resolve through the political process. *See, e.g.*, *Miller*, 515 U.S. at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests.").

C. The presumptions of constitutionality and good faith for government actions, combined with the many traditional purposes inherent in any reapportionment, make it incredibly difficult—if not impossible—to show invidious partisan purpose.

Even if the Court were to entertain the possibility that a drastic, specific type of partisan purpose could possibly rise to the level of invidious or irrational intent, it would be very difficult—if not impossible—to sustain such a claim. This Court's established precedent makes clear that any unlawful-purpose analysis requires "extraordinary caution" and faces an exacting standard: it requires the clearest proof of invidious purpose in light of the heavy presumptions of constitutionality and good

faith accorded to government actions. *See, e.g.*, *Miller*, 515 U.S. at 916 (recognizing a "presumption of good faith that must be accorded legislative enactments, requir[ing] courts to exercise extraordinary caution in adjudicating claims that a State has [engaged in invidiously-motivated action]"). Plus, any redistricting plan will necessarily involve traditional, legitimate reapportionment purposes—including compliance with the one-person, one-vote doctrine, which already significantly cabins the ability of legislatures to engage in excessive partisan gerrymanders.

1. The exacting standard for invidious-purpose challenges to government action is just one application of the Court's general recognition that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in "good faith," *Miller*, 515 U.S. at 916; and that a "presumption of regularity" attaches to official government action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). These doctrines create a "heavy presumption of constitutionality." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990).

This Court, therefore, "has recognized, ever since *Fletcher v. Peck*, [6 Cranch 87, 130-31 (1810),] that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 n.18 (1977). So the Court has permitted an unlawful-purpose analysis of government action in only a "very limited and well-defined class of cases." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 n.6 (1991).

Even when it has permitted an unlawful-purpose analysis of government action, the Court has

concomitantly stated that any such analysis proceeds under an exacting standard. As Chief Justice Marshall explained over two centuries ago in *Fletcher*, government action can be declared unconstitutional only upon a "clear and strong" showing, 6 Cranch at 128.

The Court has thus explained, in various contexts, that only clear proof of unlawful purpose can allow courts to override facially neutral government actions. For example:

- When there are "legitimate reasons" for government action, courts "will not infer a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987) (rejecting equal-protection claim).
- A law's impact does not permit "the inference that the statute is but a pretext" when the classification drawn by a law "has always been neutral" as to a protected status, and the law is "not a law that can plausibly be explained only as a [suspect class]-based classification." *Feeney*, 442 U.S. at 272, 275 (1979) (rejecting equal-protection claim); *see Arlington Heights*, 429 U.S. at 269-71; *Washington v. Davis*, 426 U.S. at 245-48.
- Only the "clearest proof" will suffice to override the stated intent of government action, to which courts "defer." *Smith v. Doe*, 538 U.S. 84, 92 (2003) (rejecting ex-post-facto claim); *see Flemming v. Nestor*, 363 U.S. 603, 617 (1960) (citing *Fletcher*, 6 Cranch at 128).

This exacting standard for an unlawful-purpose challenge to facially neutral government action exists for good reason. It keeps a purpose inquiry judicial in nature, safeguarding against a devolution into policy-

based reasoning that elevates views about a perceived lack of policy merit into findings of illicit purpose. Even when an official adopts a different policy after criticism of an earlier proposal, critics can be quick to perceive an illicit purpose when they disagree with the final policy issued. *See Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) ("In times of political passion, dishonest or vindictive motives are readily attributed ... and as readily believed."). The clearest-proof standard helps keep the Judiciary above that political fray.

2. The fact that reapportionment will always necessarily involve traditional redistricting motives in addition to partisan motives also significantly undermines any allegation of invidious partisan gerrymandering.

Legislatures in charge of redistricting operate under a "broad mandate," and their decisions are rarely "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Thus, while partisan advantage is ever present, it is never a legislature's sole concern in redistricting. Many other traditional, legitimate factors figure into decisions to draw district boundaries in a certain way, such as "compactness, contiguity, and respect for political subdivisions." *Shaw v. Reno*, 509 U.S. at 647.

Importantly, the one-person, one-vote doctrine also significantly cabins the ability of legislatures to rely excessively on partisan purpose. By requiring districts of nearly equal population, legislatures are already limited in how they can use partisan purpose in reapportionment. *See, e.g.*, *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) ("Over the ensuing decades, the Court has several times elaborated on the scope of the one-person, one-vote rule.").

When weighing all these traditional reapportionment criteria, politicians' attention naturally gravitates

towards the "the location and shape of districts [that] may well determine the political complexion of the area," *Gaffney*, 412 U.S. at 753, and affect their chances of reelection or the probability that their favored legislation will pass. Voters expect no less. *See* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?* 33 UCLA L. Rev. 1, 74 (1985) ("[W]hat . . . matters to almost all Americans when district lines are drawn, is how the fortunes of the parties and the policies of the parties stand for are affected. When such things are at stake there is no neutrality. There is only political contest.").

D. The district court did not apply a presumption of constitutionality and good faith, and it contravened this Court's precedent by equating partisan purpose with invidious intent.

Rather than apply a presumption of constitutionality and good faith while exercising "extraordinary caution," *Miller*, 515 U.S. at 916, the district court did the opposite. It ignored this Court's precedent by finding invidious purpose based on the reapportionment drafters' expressed partisan purpose in redistricting. *E.g.*, J.S. App. 126a (purpose of plan was to "secure the Republican Party's control of the state legislature for the decennial period"); J.S. App. 126a-36a (drafters considered partisan data to predict outcome); J.S. App. 139a (drafters considered partisan effects and "durability" of their plan). Evidence of partisan purpose is not evidence of invidious intent. *See supra* Part I.B. But under the district court's approach, any effort to secure a marginal partisan advantage might qualify as prohibited invidious discrimination.

Problematically, the district court shifted the burden to Wisconsin to provide a non-partisan rationale for its redistricting, essentially treating partisan motive as invidiously suspect. Requiring that States minimize the partisan effects of redistricting—and tasking courts with ensuring that they do—invites massive judicial intervention in the redistricting process and draws courts further into the "political thicket" than this Court's apportionment jurisprudence has ever envisioned: "Federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. And redistricting is a "duty and responsibility of the State through its legislature." *Chapman*, 420 U.S. at 27. Pervasive judicial involvement is "unwelcome," from the perspective of both the States and the courts, because decennial reapportionment "is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *LULAC v. Perry*, 548 U.S. 399, 416 (2006) (plurality op.).

Nor would the States find any comfort in "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." J.S. App. 123a (quoting *Arlington Heights*, 429 U.S. at 266). Circumstantial evidence—and likely direct evidence—will presumably abound with indicators of political motive. *See, e.g.*, *Vieth*, 541 U.S. at 347-50 (Souter, J., dissenting) ("[U]nder a plan devised by a single major party, proving intent should not be hard, . . . politicians not being politically disinterested or characteristically naïve."). And the "components of the analysis" under *Arlington Heights*, J.S. App. 171a, are not necessary elements of any claim; they are merely circumstantial-evidence "subjects of proper inquiry" that can be analyzed to determine whether the independent

elements of the underlying claim are satisfied. 429 U.S. at 268.

Contrary to the district court's suggestion, court- or commission-drawn plans will also be subject to extensive litigation. A recent case before this Court proves that claims of partisan gerrymandering will not "stall," J.S. App. 171a, merely because a court or commission drew the challenged plan, *see Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1307 (2016) (rejecting claim that deviations from population equality resulted from the redistricting commission's "political efforts to help the Democratic Party").

II. Neither the District Court's nor Plaintiffs' Test Presents Judicially Discoverable and Manageable Standards for Determining When a Reapportionment Has an Invidious Partisan Purpose or Sufficiently Burdens Representational Rights.

Even assuming that the Court determined that a drastic, specific type of partisan purpose in redistricting is invidious, the Court would still need to fashion a manageable standard for (1) distinguishing that specific type of invidious partisan purpose from legitimate partisan purposes, and (2) determining when a redistricting plan has a sufficient discriminatory effect or burden on representational rights. After all, as with any Equal Protection Clause claim based on an invidious purpose, a challenger must show not only invidious purpose but also a discriminatory effect—which would be an unconstitutional cognizable burden on representational rights in a partisan-gerrymandering claim. *See, e.g.*, *LULAC*, 548 U.S. at 418 (plurality op.) ("[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . . . show a burden, as measured by a reliable standard, on the complainants' representa-

tional rights."); *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) ("[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.").

Neither the district court nor the plaintiffs have come close to demonstrating the existence of manageable standards for partisan-gerrymandering claims that overcome the strong presumption of constitutionality and good faith applicable here. As Wisconsin notes, the district court adopted an "entrenchment" test. *See, e.g.*, Appellants' Br. 20-21, 53-59. But *Vieth* already rejected party entrenchment as a manageable partisan-gerrymandering standard, and not even plaintiffs have defended the district court's entrenchment test. *See id.* at 53-54.

This brief therefore will address portions of the district court's analysis that plaintiffs might try to separate from the district court's entrenchment test. The district court's analysis of partisan effect relied on a theory of *group* rights never recognized by this Court, and that theory in turn compels a test requiring a form of proportional representation. *See infra* Part II.A. But this Court has rejected proportional representation as a manageable standard for partisan-gerrymandering claims. *See infra* pp.21-22. The plaintiffs' proposed test—based on the so-called "efficiency gap"—fares no better. *See infra* Part II.B. Far from a meaningful measure of excessive partisan purpose, plaintiffs' test is essentially a mathematical repackaging of a proportional-representation standard.

A. The district court improperly relied on a theory of group—rather than individual—rights, which leads to a proportional-representation standard already rejected by this Court.

1. The district court's opinion morphed the plaintiffs' *individual* rights against vote dilution into a *group* entitlement to a certain degree of statewide political power, contrary to this Court's precedent. Although the district court claimed that "one-person, one-vote and vote dilution cases provide the foundation for evaluating claims of political gerrymandering," J.S. App. 78a, the court's basis for recognizing the plaintiffs' claims was the perceived impediment of the "ability of Democrats to translate their votes to seats," J.S. App. 79a. This analysis of statewide vote and seat totals focuses on the collective ability of groups to secure a "fair" level of representation in the legislature, rather than on the dilution of individuals' votes.

Yet, as this Court has long recognized, "the right to an undiluted vote does not belong to the 'minority as a group' but rather to 'its individual members.'" *LULAC*, 548 U.S. at 437 (plurality op.) (quoting *Shaw v. Hunt*, 517 U.S. 899, 917 (1996)); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[T]he Fifth and Fourteenth Amendments to the Constitution protect persons, not groups.").

Specifically, the district court concluded that the Wisconsin redistricting plan's tendency to produce electoral results favoring Republicans constituted a dilution of plaintiffs' vote, reasoning that the ability of plaintiffs to "secur[e] a political voice depends on the efficacy of the votes of Democrats statewide." J.S. App. 226a. The district court did not consider the electoral history of the plaintiffs' districts, their voting history, or pre-

ferred candidates, and the court entirely avoided an inquiry into whether any of the plaintiffs' *individual* votes were somehow invidiously diluted. Instead, the district court evaluated "the ability of voters of a certain political persuasion to form a legislative majority," asking whether this resulted in their "unequal particip[ation] in the decisions of the body politic." J.S. App. 106a-07a. But this view of effective representation as requiring statewide partisan fairness is at odds with the Court's clear holding that "[a] predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are *individual and personal in nature*." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (emphasis added).

A partisan-gerrymandering analysis cannot ignore district-specific factors, including the historical makeup of individual districts. By emphasizing the cumulative statewide performance of Democratic candidates, the district court side-stepped the inescapable fact that "American legislative elections are district-oriented, head-on races between candidates of two or more parties." *Whitcomb*, 403 U.S. at 153. Voters who supported a losing candidate will not have the representation they preferred—that is the nature of electoral politics. And the very nature of single-member, "first-past-the-post" districts means "a party with a bare majority of votes or even a plurality of votes will often obtain a large legislative majority, perhaps freezing out smaller parties." *Vieth*, 541 U.S. at 357 (Breyer, J., dissenting). But this Court has never viewed these features of the American electoral system as "a denial of equal protection . . . , even in those so-

called 'safe' districts where the same party wins year after year." *Whitcomb*, 403 U.S. at 153.

The majority's opinion below also downplays the effect of geographic clustering, where Democratic-leaning voters tend to be concentrated in high-density urban areas. This well-documented phenomenon exists across the country, with predictable effects on district-level elections. *See, e.g.*, *Vieth*, 541 U.S. at 290 (plurality op.) (recognizing that "political groups that tend to cluster (as is the case with Democratic voters in cities) would be systematically affected by what might be called a 'natural' packing effect"); Paul A. Diller, *Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking*, 77 La. L. Rev. 287, 336 (2016) ("The same overlap of residential demography and political preference that skews the U.S. House in favor of Republicans operates, perforce, at the state level because a vast majority use contiguous, single-member, winner-take-all districts to elect legislators.").

The district court majority acknowledged, and the plaintiffs conceded, that "Wisconsin's political geography affords Republicans a modest natural advantage in districting." J.S. App. 200a. In fact, plaintiffs' demonstration plan, which was drawn to minimize their "efficiency gap" metric, still showed an efficiency gap of 2.2% to 3.89% in favor of Republicans under their own measure. J.S. App. 202a, 203a n.355.[5]

The majority discounted this factor on the ground that geography alone "cannot explain the burden that Act 43 imposes on Democratic voters in Wisconsin." J.S. App. 217a-18a. But other factors, such as larger num-

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[5] To reach the 2.2% efficiency gap, the plaintiffs' expert assumed that there were no incumbents. Accounting for incumbency, the figure rose to 3.89%. J.S. App. 203a n.355.

bers of uncontested elections and variations in turnout, may correlate with and magnify the effects of geographic clustering. *See* J.S. App. 243a, 309a-11a (Griesbach, J., dissenting). It is a symptom of the district court's reliance on plaintiffs' efficiency-gap approach, *see infra* Part II.B, that the court's analysis is divorced from evidence regarding particular districts—and thus factors the Court has previously found indispensable to redistricting analysis.[6]

2. The district court pretended that it was not enshrining a group right to proportional representation by asserting that its analysis of statewide voting and outcomes was simply measuring the "magnitude" of partisan motivations in redistricting. J.S. App. 169a. But the court's measure of the degree of partisan effects necessarily turns on a comparison of statewide voting and outcomes—that is, a measure of proportional representation. The district court expressly relied on the plaintiffs' proposed "efficiency gap" test—which is a proportional-representation measure, *see infra* Part II.B—as one factor in its unbound totality-of-the-circumstances analysis.[7] J.S. App. 176a (treating efficiency gap analysis as basis for effect analysis).

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[6] Nor should the partisan effect of Wisconsin's Act 43 be overestimated. As Judge Griesbach's dissent pointed out, Republicans already had an "efficiency gap" advantage before Wisconsin reapportioned, so any partisan changes from the prior map are not so striking as the district-court majority seemed to believe. *See* J.S. App. 245a-46a; *see also* J.S. App. 235a (Griesbach, J., dissenting) ("[I]t is very likely that the Republicans would have won control of the legislature in 2012 and 2014 *even without the alleged gerrymandering*, and so this case presents a poor vehicle for the remedying of any grave injustice.").

[7] The district court's analysis also erroneously rested on speculative predictions about how the "efficiency gap" would operate

This Court has consistently rejected proportional representation metrics as a manageable measure for partisan-gerrymandering claims under the Equal Protection Clause. *See, e.g.*, *Whitcomb*, 403 U.S. at 156 (rejecting "the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote."); *Bolden*, 446 U.S. at 75–76 (plurality op.) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization."); *id.* at 122 (Marshall, J., dissenting) ("The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to

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in hypothetical future elections throughout the upcoming decade. The district court concluded, and plaintiffs ask this Court to affirm, that Act 43 was likely to "entrench the Republican party in power," in part because "Wisconsin's plan would have an average pro-Republican efficiency gap of 9.5% for the entire decennial period." J.S. App. 164a. The panel's conclusion relied on expert-witness speculation about how the efficiency gap might change in the future, given hypothetical statewide vote totals. J.S. App. 165a-66a (relying on projected future results for decennial period); *see also* J.S. App. 148a-53a (discussing "swing analysis" and efficiency gap). But this Court has previously rejected the call to "adopt[] a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." *LULAC*, 548 U.S. at 420 (plurality op.).

elect representatives in proportion to its share of the population."); *see also, e.g.*, *Vieth*, 541 U.S. at 228 (plurality op.) ("groups . . . [do not] have a right to proportional representation); *id.* at 308 (Kennedy, J., concurring in the judgment) (agreeing with plurality's rejection of proposed tests); *Bandemer*, 478 U.S. at 132 (plurality op.); *id.* at 155 (O'Connor J., concurring) (reasoning that to recognize a partisan gerrymandering claim, the Court would have to "evolve towards some loose form of proportionality").

It is true that the majority did not require that a political party's share of the statewide vote be in *perfect* proportion to the number of seats held by that political party. *See* J.S. App. 169a. But just because the district court did not require perfect proportional representation does not mean that its analysis was not inexorably intertwined with a determination of proportional representation. A standard that requires almost, but not quite, perfect proportional representation is hardly a judicially manageable partisan-gerrymandering standard, and it does not comport with this Court's precedents.

As Judge Griesbach's dissent rightly explains, the majority's reasoning below on proportional political outcomes would, in effect, require lawmakers to aggressively eliminate many partisan considerations—as if partisan motive were invidiously suspect. J.S. App. 245a-46a (majority's test would require legislators to "engage in heroic levels of nonpartisan statesmanship"). The logic of the district court majority's opinion would permit a finding of partisan gerrymandering based on some unknown degree of disproportionality between statewide votes and legislative seats, provided only that the seats-to-votes gap persisted over the decennial re-

districting period. This would inject courts into the redistricting process in a novel, massively intrusive way.

B. Plaintiffs' proposed "efficiency-gap" test does not provide a judicially manageable standard.

Not only did the district court fail to create a judicially manageable standard, but the plaintiffs also have not offered a workable test. The "efficiency gap" test proposed by the plaintiffs (J.S. App. 159a-61a) purports to correct the flaws of another measure of "fairness"—the "symmetry standard"—rejected in *LULAC*. 548 U.S. at 420 (plurality op.); *id.* at 492 (Roberts, C.J., concurring in the judgment); *id.* at 511 (Scalia, J., concurring in the judgment). But plaintiffs' "efficiency gap" test is flawed as well.

1. The previously rejected "symmetry" standard measured the supposedly discriminatory effect of a map on "hypothetical" voters and "depend[ed] on conjecture about where possible vote-switchers will reside." *LULAC*, 548 U.S. at 420 (plurality op.). Plaintiffs' "efficiency gap" metric, in contrast, was conceived as a measure of "the parties wasted votes in [an] actual election." Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 857 (2015). This "efficiency gap" metric purports to identify when a redistricting plan "enables a party to convert its votes into seats more efficiently than its adversary—even if this edge would vanish under different electoral conditions." *Id.* at 859. The glaring problem with this approach is that it is just another mathematical formula measuring relative, proportional partisan outcomes.

This efficiency gap is defined through simple arithmetic: "[It] is . . . the difference between the parties'

respective wasted votes, divided by the total number of votes cast in the election." *Id.* at 851 (emphasis omitted). So-called "wasted" votes are those that do not arithmetically contribute to the victory of a candidate in a two-way race—that is, all votes either (1) for the winning candidate beyond the 50% threshold for victory or (2) for a losing candidate. *See id.* at 850-53. Thus, for each election analyzed, nearly 50% of the votes cast are considered "wasted" under this "efficiency gap" measure. So, importantly, labeling a vote as "wasted" under this measure is nothing at all like this Court's standard for unlawful vote dilution under the Voting Rights Act. *E.g.*, *LULAC*, 548 U.S. at 426-27 (plurality op.). In practical terms, a party whose voters are more evenly distributed among legislative districts will see an efficiency gap in its favor. But that says nothing about the conditions in each of those districts.

Based on this calculation, plaintiffs allege that, as a result of Wisconsin's district lines, "Republicans . . . wield legislative power unearned by their actual appeal to Wisconsin's voters." Mot. to Affirm at 1. But that just begs the question, as plaintiffs fail to explain what precisely makes a political party's "legislative power unearned." *Id.*

Tellingly, Wisconsin's own historical experience proves that the "efficiency gap" does not measure anything relevant to a determination of excessive, invidious partisan purposes or effects. Under Wisconsin's prior court-drawn map used from 2002 to 2010, the "efficiency gap" consistently favored Republicans—ranging from 4% to 12%. J.A. Vol. I at 221 (¶240), 223 (¶¶252-56). And as the district court emphasized, that map was drawn by a court "in the most neutral way it could conceive." J.S. App. 11a (quoting *Baumgart v. Wendelberger*, Nos. 01-C-0121, 02-C-0366, 2002 WL 34127471,

at *7 (E.D. Wis. July 11, 2002) (per curiam)). Nevertheless—even with a map giving Republicans a 4% to 12% "efficiency gap"—in 2008, the Democratic Party in Wisconsin won a *majority* of the seats in the State Assembly. J.A. Vol. I at 224 (¶255). When the Republican Party retook the Assembly in 2010, it did so despite the lowest Republican efficiency gap since 1996. J.A. Vol. I at 222 (¶249), 224 (¶256). Finally, in 2012, the year Wisconsin's Act 43 produced a supposedly anti-democratic result by denying Democrats a legislative majority, 53% of Wisconsin voters rejected the attempted recall of Republican Governor Scott Walker. J.A. Vol. I at 249 (¶287).

Consequently, the efficiency gap does not actually measure vote dilution or distribution in reality, but simply the deviation from a statewide proportional votes-to-seats ratio masked by an additional mathematical formula. This is just another measure of proportional representation.

2. The analytical problems created by relying on the abstract "efficiency gap" analysis are underscored by the fact that plaintiffs assert that any redistricting map with a 7% or greater "efficiency gap" is unconstitutional. J.A. Vol. I at 60 (¶86). Plaintiffs' selection of the 7% figure is derived from their expert's projection that a percentage greater than 7% would tend to correlate with control of a legislature never shifting to another political party, J.A. Vol I at 58-60, and their expert's hypothetical conclusion that a 7% efficiency gap would prevent control of a state legislature from shifting based on a projected statewide vote share, J.A. Vol. II at SA164.

This standard would have invalidated redistricting plans in 36 States over the past few decades. The plaintiffs' expert, Jackman, applied the plaintiffs' efficiency-

gap test to elections in 41 States over a 43-year period, finding invidious partisan purpose whenever the first election under a plan produced an efficiency gap greater than 7%. *See* J.A. Vol. II at SA212-SA213. This test would have condemned approximately *one-third* of the redistricting plans in the 786 elections analyzed in the study. J.A. Vol. II at SA212-SA214. Plaintiffs' test would have found an impermissible partisan gerrymander in at least one plan in 36 of the 41 States analyzed[8]—including Alabama, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, New Mexico, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Vermont, Washington, Wisconsin, West Virginia, and Wyoming. *See* J.A. Vol. II at SA214.

Even when confining this analysis to elections held in just 2012 and 2014, Jackman found an efficiency gap greater than 10% in Florida, Indiana, Kansas, Michigan, Missouri, North Carolina, New York, Ohio, Rhode Island, Virginia, Wisconsin, and Wyoming. *See* J.A. Vol. II at SA253. In addition, Jackman averred that one political party could win a majority in the legislature without obtaining a majority of statewide votes in post-2010 redistricting plans in Alaska, Colorado, Georgia, Maine, Minnesota, Oregon, Pennsylvania, and Vermont. *Id.*

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[8] Jackman excluded 9 States—Arizona, Idaho, Louisiana, Maryland, Nebraska, New Hampshire, New Jersey, North Dakota, and South Dakota—from his analysis because they had "exceedingly high rates of uncontested races" or because they used multi-member districts, non-partisan elections, or a run-off system. J.A. Vol. II at SA200.

And as noted above, *see supra* Part II.A, the district court's standard is even more open-ended than the plaintiffs' proposed standard. Eschewing plaintiffs' 7% threshold, the district court found that Wisconsin "burden[ed] the representational rights of Democratic voters in Wisconsin by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43." J.S. App. 176a-77a. In other words, the district court did not even adopt a certain numerical threshold for liability, instead treating *any* "efficiency gap" level as permissible circumstantial evidence that can always be considered under *Arlington Heights*. J.S. App. 176a. Under this rationale, as long as a state legislature intended to create some degree of partisan electoral advantage—and it is difficult to imagine how this could *not* be proven—then the plan would be unconstitutional.

The plaintiffs' theory or the district court's test, if adopted, would require the Court to completely overhaul its redistricting jurisprudence, disregard fundamental premises recognized repeatedly by the Court, and require courts to perpetually calculate and compare the relative level of partisan intent and proportional partisan effect of every redistricting effort in every State. Nothing in the Constitution supports this transformation of the democratic process.

CONCLUSION

This Court should vacate the judgment of the district court and order the district court to dismiss the lawsuit for lack of Article III jurisdiction under the political-question doctrine. Alternatively, this Court should reverse the judgment of the district court.

Respectfully submitted.

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